Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-25

In the Matter of

Implementation of Section 25
of the Cable Television Consumer
Protection and Competition Act
of 1992

Direct Broadcast Satellite
Public Service Obligations

NOTICE OF PROPOSED RULE MAKING

Adopted: February 11, 1993; Released: March 2, 1993

Comment Date: May 24, 1993
Reply Comment Date: June 30, 1993

By the Commission: Commissioner Marshall not participating.

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I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] Section 25 of the 1992 Cable Act, which added new Section 335 to the Communications Act of 1934, as amended, requires the Commission to impose on providers of direct broadcast satellite service video programming obligations which must include, at a minimum, the political programming requirements set forth in Sections 312(a)(7) and 315 of the Communications Act of 1934. In addition, Section 25 requires the Commission to adopt rules governing the reservation and availability of channels for noncommercial educational and informational programming at reasonable rates. Finally, the Commission must examine the opportunities that the establishment of DBS service provides for fulfilling the Commission's long standing goal of service to local communities. In this Notice of Proposed Rule Making, we seek comment on various proposals to implement these provisions of Section 25.

II. DEFINITION OF PROVIDER OF DBS SERVICE

2. As a threshold matter, it is important to identify specifically the types of entities that will be subject to the video programming obligations proposed in this proceeding. Section 25(a) of the 1992 Cable Act, which addresses the video programming obligations to be adopted by the Commission, states generally that these requirements should cover "providers of direct broadcast satellite service" providing video programming.[2] Section 25(b), which sets forth the noncommercial channel reservation requirements, includes a more specific definition of the DBS entities that are to be subjected to its requirements. This definition makes reference to entities operating in conjunction with licenses under Parts 25 and 100 of the Commission's Rules.

3. Deciding which DBS entities should be covered by subsections 25(a) and (b) of the 1992 Cable Act is complicated by both our DBS regulatory regime and the complexities of the satellite programming distribution business. By way of background, the term direct broadcast satellite ("DBS") service originally referred to a "radiocommunication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by inexpensive earth terminals" as regulated by Part 100 of the Commission's Rules.[3] This Part 100 service was established by the Commission in 1982 to use specific frequencies in the Ku-band[4] that would provide service on a regional and/or national basis. Although the Commission has issued 9 construction permits in this Part 100 service, none of these permittees has commenced operations.[5]

4. Since 1982, the term DBS service has also been used to refer to direct-to-home delivery of programming by fixed-satellite service ("FSS") operators using low-powered and medium-powered satellites in the C-band (4/6 GHz) frequency bands and in portions of the Ku-band. The satellites used to transmit this programming are licensed

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).
[2] *See* Sections 25(a) and (b)(1) of the Cable Act.
[3] *See Report and Order* in Gen. Docket No. 80-603 ("*DBS Report and Order*"), 90 FCC 2d 676, 677 n.1 (1982).
[4] The Ku-band generally refers to a band of frequencies at approximately 12 GHz. Specifically, DBS licensees under Part 100 use frequencies between 12.2 and 12.7 GHz for communications direct to the home.
[5] One DBS satellite, carrying at least three different program packages for three different companies totalling over 100 channels, is scheduled for launch within a year.

under Part 25 of the Commission's Rules and do not utilize the same frequencies or orbital positions as the Part 100 service. Since these satellites are not as high-powered as the Part 100 satellites, they require larger receive antennas. Currently, most satellite delivery of video programming is occurring in the C-band and includes transmissions to and from broadcast stations, transmissions from program sources to the headends of cable systems, and transmissions to home satellite dish ("HSD") or "backyard" receivers.[6] However, some services also are being provided under Part 25 of our Rules in the Ku-band.[7]

5. At the outset, we note that Congress apparently intended to exclude C-band DBS operations from the obligations to be imposed by Section 25 of the 1992 Cable Act. The definition of affected DBS programming providers set forth in subsection (b)(5) is expressly limited to entities operating pursuant to Parts 25 or 100 of our Rules in the Ku-band. Although there is some question as to whether the definition in subsection (b)(5) applies to both subsections (a) and (b), we tentatively conclude that Congress intended to limit the scope of Section 25 to DBS services provided in the Ku-band. We seek comment on this interpretation.

6. In the paragraphs that follow, we seek comment on the various components of the statutory definition in subsection 25(b)5 and on whether this definition applies to subsection 25(a) as well. We wish to emphasize, however, that the business of providing DBS services involves a variety of potentially complex interrelationships that may affect the application of the different obligations imposed by Section 25. For example, there can be several layers of entities involved in the actual delivery of video programming by satellite to viewers' homes through DBS systems. A DBS service provider could own the satellite and control the acquisition and transmission of such programming to home viewers. Alternatively, the owner of a satellite could lease some or all of the channels on its satellite to entities which provide video programming directly to home viewers. Further variations of these scenarios could occur, such as a satellite owner selling or leasing channels to third parties which in turn sell or lease channels to the actual entities providing the video programming. In addition, the actual entity responsible for providing the video programming to home viewers may contract with other program suppliers and distributors to handle specific channels on its DBS system. The prevalence of these and other arrangements in the DBS industry obviously complicates the task of identifying which entity controls the use of a satellite channel and which controls the programming delivered over that channel. Accordingly, to assist us in interpreting the statutory definition and the obligations imposed by the new Act, commenters are asked to provide information about the distribution of programming in the DBS industry and to address how the practical realities of that distribution process affect the application of Section 25.

A. Licensees Under Part 100

7. We now turn to an analysis of the statutory definition of DBS provider set forth in subsection 25(b) of the 1992 Cable Act. That subsection includes two alternative definitions. The first involves "a licensee for a Ku-band satellite system under part 100 of title 47 of the Code of Federal Regulations." When the DBS service was created in 1982, the Commission took a flexible regulatory approach, in which Part 100 licensees were not required to conform to any particular regulatory model, in order to encourage the development of this new service. As a result, licensees under Part 100 of our rules have the option of operating and being regulated in whole or in part as broadcasters, who are subject to the requirements of Title III of the Communications Act.[8] A licensee that is not a broadcaster can lease satellite capacity to a "customer-programmer" who controls the use of those channels and uses the leased channels to distribute programming by satellite directly to the homes of viewers.[9]

8. Regardless of the regulatory classification of DBS licensees, we tentatively conclude that, in view of the explicit language of Section 25, licensees under Part 100 should be held ultimately responsible for ensuring that the obligations adopted pursuant this section are met. Exercise of this responsibility should not be difficult for Part 100 licensees who retain control over the programming carried on their systems. However, depending on the distribution arrangement involved, we recognize that a Part 100 licensee as a practical matter might be forced to delegate the day-to-day functions of implementing these requirements to the entity that is actually controlling the distribution of programming by satellite to home viewers. *See also House Report* at 124 (channel reservation requirements apply to DBS service providers who use satellite facilities, not licensees unless licensee provides programming). As noted above, we request information on the division of functions and duties and the typical contractual and practical relationships that occur or are developing among the various entities involved in the delivery of programming in the Part 100 DBS service. Commenters should also address how the practical aspects of program delivery in this service should affect our treatment of the responsibilities imposed by Section 25 consistent with the 1992 Cable Act.

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[6] These HSD receivers are large (*i.e.*, over 2 meters in diameter) and are to be distinguished from the smaller earth terminals needed for DBS reception in the Ku-band, which could range from 1 meter to 1/2 meter or less. *See* Johnson, Leland L., *Direct Broadcast Satellites: A Competitive Alternative to Cable Television*, Rand, 1991 at v-vi and 5-6.

[7] FSS licensees under Part 25 use frequencies between 11.7 and 12.2 GHz for their downlink (transmission to earth) facilities.

[8] "Broadcasting" is defined in Section 3(o) of the Communications Act as "the dissemination of radio communications intended to be received by the public directly, or by the intermediary of relay stations." 47 U.S.C. 153. Although broadcasters must comply with some statutory restraints -- such as the political broadcasting laws discussed *infra* -- they retain control over the use of their stations and can select what material is aired. The Commission has previously concluded that DBS licensees who provide subscription programming services do not provide broadcast service as defined in Section 3(o) and are not subject to the statutory political broadcasting requirements. *See Subscription Video*, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

[9] Commenters may address any relevant implications that the particular regulatory classification(s) under which a Part 100 licensee operates, and the obligations imposed pursuant to that classification, may have on the requirements imposed by this section of the 1992 Cable Act. They also may address parallel questions for distributors using Part 25 facilities. *See* para. 16 *infra*.

B. Entities Under Part 25

9. The section 25 definition of a DBS provider also includes another type of entity, namely "any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25 of title 47 of the Code of Federal Regulations."[10] As discussed below, we seek comment on the proper interpretation and implementation of this statutory definition.

10. The first component of this part of the DBS provider definition is that the entity be a distributor who controls channels. The statute does not define the term "distributor" or "control." Our initial view is that distributors would include parties that are engaged in various activities related to the delivery of video entertainment programming such as program packaging, program delivery, subscription billing and customer service.[11] In addition, we must determine what actions such a distributor must take to be considered in "control" of channels. As discussed below, although this term could mean licensees who have basic technical control of a transponder, it may also have been intended to mean control through lease, sale or other arrangement with a satellite operator that gives the distributor the right to select and transmit its programming and limit access to that programming.

11. At the present time, we are aware of only one company, PRIMESTAR Partners LP (PRIMESTAR),[12] that offers video programming directly to the home in the Part 25 Ku-band. PRIMESTAR uses leased capacity on a domestic fixed-satellitelicensed to and operated by GE American Communications Inc.(GE). PRIMESTAR began operations in mid-1991 and currently offers seven superstations',[13] three pay-per-view channels and one foreign language channel (Japanese) to viewers in a limited geographic area. It rents satellite reception equipment to homeowners and provides subscription service delivered by satellite and sold through cable operators who act as agents for PRIMESTAR. Another entity, Skypix, has announced plans to offer multiple channels of programming directly to homes via the Ku, fixed-satellite bands, using digital compression technology. We assume that the statutory definition would encompass entities such as PRIMESTAR and Skypix and request information about characteristics of these entities that should be considered in further refining the definition of distributor. We also request information about entities presently offering such service or any other potential services that plan to use Ku-band fixed-satellites for the provision of direct-to-home video programming.

12. As required by Section 25, the Commission must also decide the appropriate number of channels that would trigger the obligations of Section 25 for a Part 25 program distributor. We seek comment on what types of considerations would be relevant in identifying this specific number for purposes of the rules we will adopt in this area. We could consider the percentage controlled by a distributor of the total number of channels used to provide such service in determining how many channels a particular distributor must control before it is subject to these rules. In such an analysis, minimum numbers might be better cast in terms of percentages of these totals. We also seek comment on other factors that may be relevant to this aspect of the statutory definition, such as the degree to which the distributor affects competition or viewpoint diversity in the video distribution market.

13. In addition, we will need to define the term "channel." Under Part 100 rules, a channel normally refers to a 24 MHz portion of radio spectrum. In the fixed-satellite service, the Part 25 rules do not specify the amount of spectrum included in a "channel". However, we understand that it is customary for a fixed-satellite operator to use approximately 30 to 36 MHz of spectrum to provide a video signal of comparable quality to that of a Part 100 channel. We seek comment on this understanding. In addition, using present technology, the entire width of a 40 MHz satellite transponder is usually necessary to transmit a studio broadcast quality video signal, and the number of programs transmitted is directly related to the transponder capacity of the space station. With the advent of digital compression technology and the ability to transmit several video programs using a single transponder, we must determine whether "channel" should refer to a whole transponder or to a single one of the program services contained in a compressed signal. We also must recognize that the amount of compression that can be accomplished within a single transponder channel will depend on the type of programming transmitted. Thus, we are initially inclined to count or "define" channels for purposes of triggering this obligation in terms of an explicit number of specified 24-MHz-wide channels for Part 100 licensees and in terms of the number of transponders and/or some multiple of 30-36 MHz used for video programming by Part 25 DBS providers. We seek comment on these issues and, in particular, on technical factors that might impact our determinations.

14. Because direct-to-home video service is a new use of fixed-satellite facilities in the Ku-band, the distributors involved are new companies and possibly have limited re-

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[10] Fixed-satellite services are offered in both the C-band and the Ku-band. Ku-band refers to 11.7-12.2 GHz downlink frequencies. *Amendment of C-Band Satellite Orbital Spacing Policies to Increase Satellite Video Services to the Home (3^0 Spacing)*, 7 FCC Rcd 456 (1992). As discussed *infra*, the majority of video programming offered for reception by home satellite antennas is transmitted in the C-band.

[11] For example, we note that the 1992 Cable Act contains a definition of a multichannel video programming distributor that includes, *inter alia*, "a television receive only satellite program distributor who makes available for purchase by subscribers or customers, multiple channels of video programming." *See* 47 U.S.C. Section 602(12). *See also* "definition of video programming" in 47 U.S.C. Section 522(19). Similarly, the Satellite Home Viewer Act of 1988, 17 USC Section 119, defines "distributor" as an entity which contracts to distribute transmissions from a satellite carrier to subscribers for private home viewing.

[12] According to a 1990 filing, this company is a limited partnership including nine subsidiaries of multiple system cable operators and GE. These subsidiaries include ATC Satellite Corp., Comcast DBS, Inc., Continental Satellite Company, Inc., Cox Satellite, Inc., New Vision Satellite, TCI K-1, Inc., United Artists K-1 Investments, Inc., Viacom K-1, Inc., and Warner Cable SSD, Inc. Letter from K Prime Partners (PRIMESTAR's previous name), August 27, 1990, filed in Gen. Docket No. 89-88.

[13] A superstation, at least for purposes of the Copyright Act, is defined as a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier. 17 U.S.C. Section 119(d)(9).

sources. In addition, services using Part 25 facilities may offer much less channel capacity[14] than Part 100 DBS service proposals, which include as many as 100 channels or more of programming[15] . We request information on what number of channels can be used to trigger imposition of obligations without risking the economic viability of these new service providers, as well as any inherent service limitations which would be relevant.

15. A third component of the alternate definition of a DBS provider is that the distributor use a Ku-band fixed-satellite system for the provision of video programming directly to the home. This requirement appears to require little interpretation. As noted above, we are aware of only one entity currently using fixed-satellite facilities for direct-to-home programming services in the Ku-band. Most video service to home antennas is provided in the C-band which is used to provide programming to cable head ends for distribution to cable subscribers. The home satellite earth station industry thus has concentrated its service offerings in the C-band in order to utilize the programming already being transmitted in that band, and most home satellite antennas are equipped to receive signals only in this lower frequency band. Direct-to-home service in the Ku-band is an emerging market, and although there has been speculation that there will be an eventual migration of programming delivery from the C-band to the Ku-band, we have not seen significant evidence of this as yet.[16] We request information and comment regarding the potential expansion of fixed-satellite home video service offered in Ku-band.

16. The final component of the section 25 definition is that there be a license issued under Part 25 of the Commission's rules. Part 25 satellite facilities are authorized to operate within certain technical parameters, and the space station licensee may sell or lease on a short or long term basis any of the transponders on its satellite.[17] as long as the licensee remains in technical control of the facility. The Commission does not regulate the type of traffic carried by individual satellites. An operator is free to change the traffic on its facility without any Commission approval, provided that no technical modifications are necessary. Similarly, if the operator has several satellites it may switch traffic from one to another without Commission approval.[18] We request comment on what effect a satellite licensee's operation as a common carrier might have on the application of obligations imposed pursuant to Section 25. A programming distributor that is a customer-programmer of a Part 25 licensee can lease both earth station and space station capacity and, because it is not a licensee, does not need Commission authorization to provide programming service.

17. A question arises whether the definitional reference to a Part 25 license was intended to mean that the distributor must hold the license or that the satellite system used to distribute programming must be licensed under Part 25. The answer to that question determines whether the programmer customer or the space station licensee is the DBS provider responsible for fulfilling the obligations of Section 25 of the 1992 Cable Act. In the case of Part 100 licensees, this question can be more easily answered because the Section 25 definition specifically describes "licensees" as the DBS service providers. The most natural reading of the statutory language is that the phrase "licensed under part 25" refers to the satellite used to distribute programming. Thus the statute does not appear to mandate that a distributor also be a Part 25 licensee in order to be implicated by the (b)(5) definition. If so, the requirement for fulfilling the Section 25 obligations rests with the distributor and not with the satellite licensee. We request comment on all of these issues. In particular, commenters should address the circumstances in which a licensee may or may not be a "distributor" and whether a licensee's status as a common carrier should affect that determination.[19] Finally, commenters should also address what enforcement mechanisms can be applied to entities that are not Commission licensees.

C. Applicability of Definitions to Each Subsection

18. We seek comment on the extent to which the obligations imposed by Section 25 were intended to apply to each type of entity included in the definition. The carriage obligations set out in subsection (b) of Section 25, for example, provide that the duty to reserve channel capacity for noncommercial programming is imposed as a "condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service". This language could be read to suggest that Congress intended the obligations contained in this portion of the statute to adhere to individual service providers on a staged basis at the time they are granted (and as conditions to) authorizations or license renewal rather than on the effective date of a specific rule. We seek comment on this issue. In addition, as discussed in the previous section, a distributor programmer is not licensed under Section 301 of the Communications Act to provide direct-to-home programming in the Ku-band, fixed-satellite service. Rather, the space station operator holds the statutorily required license. We seek comment on how regulations can impose carriage obligations as a condition of provision of service when no authorization is currently necessary. Commenters should address, in this connection, any circumstances under which it was the intent of this section to exempt non-licensee DBS programmers who use Part 25 facilities from the noncommercial carriage obligations and when such obligations flow more naturally to licensees who have the ultimate authority to allocate the use of their transmission capacity.

19. In addition, as noted, the definition of provider of DBS service in subsection (b)(5) states that it is given "for purposes of this subsection." The deliberate use of the word "subsection" in lieu of "section" suggests that the definition was intended to apply to the reservation and

[14] PRIMESTAR currently offers 11 channels of programming.

[15] No Part 100 DBS licensee is currently licensed for more than 27 "standard" 24-mHz DBS channels (see discussion *infra*). Digital compression technology, however, enables the provision of more that 100 different program services on a Part 100 system with 27 "standard" channels assigned to it. Such technology would appear to be technically feasible in the Part 25 service as well, thereby increasing the number of potential program services that could be offered by Part 25 program providers.

[16] *See, 3rd Spacing, supra* n.10.

[17] *See, Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), *aff'd sub nom. Wold Communications, Inc. v FCC*, 735 F.2d 1564 (D.C. Cir. 1984).

[18] Because of the economic impact that such changes can have on customers, operators do not routinely shift satellite traffic. *See, 3rd Spacing, supra* n.10.

[19] *See, House Report* at 124.

access provisions of subsection (b) and not necessarily to the political broadcasting/public interest requirements of subsection (a). We solicit comment on this issue and on whether there is any other basis for inferring that Congress might have intended the definition to have such limited applicability. If the definition of DBS provider is limited to the obligations imposed in subsection (b), then what definition of "provider of DBS service" should be used for subsection (a) political broadcasting/public interest requirements? We note, for example, that the House and Senate versions of this section expressly exempted common carriers from these requirements, but that exemption was not carried over to the final codification. The *Conference Report* contained no explanation of why the language exempting common carriers was dropped from the final version passed by Congress. Presumably, however, such an exemption would have been inconsistent with Congress' apparent intention to apply channel reservation requirements to DBS distributors who may use satellites licensed to common carriers in the Ku-band. Commenters should address how and whether the programming requirements we ultimately adopt pursuant to subsection 25(a) can, as a practical matter, be applied to common carrier licensees or to programmer distributors and should discuss possible enforcement mechanisms.

III. PUBLIC INTEREST REQUIREMENTS

20. Section 25(a) of the 1992 Cable Act provides that:

> [t]he Commission shall, within 180 days after the date of enactment of this section, initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming. Any regulations prescribed pursuant to such rulemaking shall, at a minimum, apply the access to broadcast time requirement of section 312(a)(7) and the use of facilities requirements of section 315 to providers of direct broadcast satellite service providing video programming. Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.[20]

A. Political Broadcasting Rules

21. Section 25(a) mandates that, at a minimum, the Commission apply the access to broadcast time requirement of Section 312(a)(7) and the use of facilities requirements of Section 315 of the Communications Act to providers of direct broadcast satellite service providing video programming. In compliance with this statutory directive, we propose to apply our existing rules implementing Sections 312(a)(7) and 315 to DBS service providers, as they will be defined pursuant to Section II, above, and to tailor these rules, as discussed below, to account for differences between multichannel DBS systems and traditional broadcast stations.[21]

22. *Reasonable Access to DBS Systems by Federal Candidates.* Section 312(a)(7) of the Communications Act and Section 73.1944 of the Commission's Rules require stations to afford reasonable access for federal candidates to their facilities, or to permit federal candidates to purchase "reasonable amounts of time."[22] The Commission recently clarified and codified its policies regarding the reasonable access requirement in MM Docket 91-168.[23] Therein, the Commission continued its longstanding policy of relying upon the reasonable, good faith judgments of licensees to provide reasonable access to federal candidates and determining compliance on a case-by-case basis.[24] Since the reasonable access requirement was extensively considered in MM Docket 91-168, we do not believe it is necessary to revisit those issues in this proceeding. Accordingly, we propose to apply Section 73.1944 of the Rules and the policies codified in MM Docket 91-168 to DBS providers.

23. However, we recognize that there may be some additional issues relating to DBS that warrant comment. For example, this appears to be the first time that the reasonable access requirements of Section 312(a)(7) will be applied to video delivery systems consisting of multiple channels of programming service.[25] We solicit comment as to what constitutes reasonable access in such a situation. Should a DBS provider that controls multiple channels be required to make all video channels available to federal candidates? In this regard, we note that, as a general matter, radio and TV licensees must make all day-parts avail-

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[20] 1992 Cable Act, § 25(a).

[21] To the extent that a DBS service provider carries the programming of a terrestrial broadcast television station, we believe that it should be the responsibility of the terrestrial broadcast station, and not the DBS service provider, to ensure compliance with the political broadcasting requirements of Sections 312(a)(7) and 315 of the Communications Act on that channel since the TV station is already under an obligation to do so. This is the approach that the Commission has taken in the past with respect to cable systems carrying the programming of broadcast television stations. Likewise, if a cable television operator were to carry the programming of a DBS channel, then it should be the responsibility of the DBS service provider, not the cable television operator, to comply with the political broadcasting laws on that channel since the DBS service provider will already be under an obligation to do so. We solicit comment on these views.

[22] This right of access does not apply to candidates for state or local offices. Specifically, Section 312(a)(7) of the Communications Act states:

> (a) The Commission may revoke any station license or construction permit ... (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

[23] *Report and Order* in MM Docket No. 91-168, 7 FCC Rcd 678 (1991) ("*Codification Report and Order*"), *Erratum*, 7 FCC Rcd 920 (1992), *recon.*, *Memorandum Opinion and Order*, 7 FCC Rcd 1616 (1992) ("*Sponsorship ID MO&O*"), *recon.*, *Memorandum Opinion and Order*, 7 FCC Rcd 4611 (1992) ("*Codification MO&O*").

[24] *Codification Report and Order*, 7 FCC Rcd at 680-681.

[25] After having reviewed the legislative history of Section 312(a)(7), the Commission previously determined that it does not apply to cable television systems. *See Codification Report and Order*, 7 FCC Rcd at 680 n.11, and *Codification MO&O*, 7 FCC Rcd at 4612 (paras. 12-14).

able to federal candidates but not specific programs within those dayparts. Further, in providing equal opportunities for opposing candidates under Section 315 of the Communications Act, which will be discussed below, cable systems have never been required to make specific channels available or to take into account the demographics of particular channels. Rather, cable systems have been informally advised to air opposing political advertisements on channels with comparable audience size. Should such an approach be followed by DBS providers in acting upon requests by federal candidates for access to DBS systems? If not, what guidelines should be used for making channels available and taking into account demographic factors? Alternatively, should DBS operators have the discretion to place all political advertisements on one channel or a limited number of specific channels? If such an approach were followed, then to what extent should "advertisement-free" channels, which are funded on a subscription basis, be available for political advertising?

24. We also realize that the burden of the reasonable access requirement could be greater for a DBS provider than for a conventional television station, depending on the number of federal candidates that request access. Since a DBS system will provide service to the entire continental United States, potentially any federal candidate could request access. It seems plausible that federal candidates for national offices such as President or Vice President may desire to utilize DBS for political advertising. However, it is unclear as to whether candidates for the U.S. Senate or the House of Representatives will want to use DBS for political ads. The outcome could depend upon the extent to which a DBS operator could localize or regionalize its programming.[26] Accordingly, we solicit comment on the extent to which DBS may be utilized for political advertising by federal candidates and any specific burdens that this may create for DBS operators.[27] Our tentative view is that any such burdens on the DBS operators would be considered in applying these access requirements to DBS. Under current policies, broadcasters have discretion in determining what is reasonable and may take into account a variety of factors in acting upon requests by federal candidates for access. For example, broadcasters can consider "their broader programming and business commitments, including the multiplicity of candidates in a particular race, the program disruption that will be caused by political advertising, and the amount of time already sold to a candidate in a particular race."[28] Under our proposal, DBS providers would have similar discretion. Are there any other factors unique to DBS service providers that would affect this discretion?

25. *Equal Opportunities for All Candidates.* Section 315(a) of the Communications Act of 1934, as amended, and Section 73.1941 of the Commission's Rules provide that, if a broadcast licensee permits any legally qualified candidate to use its station, the licensee must afford equal opportunities to all other such candidates in the use of the station. Both the statute and the rule exempt bona fide newscasts, interviews, documentaries, and news events from these requirements. In addition, Section 73.1940 defines the term "legally qualified candidate."

26. These rules, as well as policies involving the equal opportunities requirement, were reviewed and modified in MM Docket 91-168.[29] We propose to apply Sections 73.1940, 73.1941, and 73.1212(a)(2)(ii)[30] to providers of DBS service, as well as the policies regarding equal opportunities set forth in MM Docket No. 91-168. However, we recognize that MM Docket 91-168 did not consider how requests for equal opportunities should be handled on multiple channel video delivery systems such as DBS. As indicated above, the Commission has never required cable systems to air opposing candidates advertisements on the same channels or to take into consideration the demographics of channels. Rather, the staff has informally advised CATV systems to ensure that the channels utilized have comparable audience size. Should such an approach be followed with respect to DBS? If not, what guidelines and/or demographic factors should be considered? Alternatively, should we resolve these issues on a case-by-case basis as they arise?

27. *Lowest Unit Charge.* Section 315(b) of the Communications Act of 1934, as amended, and Section 73.1942 of the Commission's Rules provide that a broadcast station may not charge any legally qualified candidate for the use of a station more than the lowest unit charge ("LUC") of the station for the same class and amount of time during the same time periods throughout the 45 days preceding a primary or runoff election and the 60 days preceding a general or special election. As we recently clarified in MM Docket 91-168, the scope of a broadcast station's obligations under Section 315(b) of the Act and Section 73.1942 of the Rules includes the duties to disclose and make all discount rates and privileges offered to commercial advertisers available to all legally qualified candidates on the same terms and conditions. We propose to apply Section 73.1942, as well as the LUC policies codified in MM Docket 91-168, to providers of DBS service providing video programming. We seek comment on this proposal.

28. *Political File Requirements.* Section 73.1943 of the Commission's Rules requires broadcast stations to maintain and permit public inspection of a complete record of all requests for broadcast time made by or on behalf of candidates, the disposition made by the licensee of such requests, and the charges, if any, made for the time. The rule also requires that the file be updated as soon as possible and that information be retained for a period of two years. Since the information required by Section 73.1943 is vital to determine compliance with the political broadcasting requirements of Sections 312(a)(7) and 315 of the Commu-

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[26] *See infra* at paras. 28-33.

[27] In its application of the reasonable access provisions in the context of national networks, the Commission has accepted that a request for time need not be honored unless the presidential candidate involved is qualified nationwide. *Carter-Mondale Presidential Committee*, 74 FCC 2d 629, 624 (1979). Paring nation wide access with national candidates thus has some precedent.

[28] *Codification Report and Order*, 7 FCC Rcd at 681-682, citing policy in the *Report and Order on Reasonable Access*, 68 FCC 2d 1079, 1090 (1978). This guideline, as well as others articulated in the *Report and Order on Reasonable Access*, were approved by the United States Supreme Court in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

[29] *Codification Report and Order*, 7 FCC Rcd at 683-687.

[30] Section 73.1212(a)(2)(ii) requires visual identification of sponsors of political advertisements in accordance with specific size and duration standards. *See Sponsorship ID MO&O*, 7 FCC Rcd at 1616-17. (1992)

nications Act, we propose to apply Section 73.1943, as well as related policies codified in MM Docket 91-148, to providers of DBS service. In addition, since DBS systems can potentially serve the entire continental United States, we solicit comment on where a provider of DBS service should keep its political file. It is our initial view that it would appear logical to require that the political file be maintained and accessible at the headquarters of the provider of DBS service.

B. Other Public Interest Requirements

29. Section 25(a) of the 1992 Cable Act states that the Commission shall "initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming." Other than requiring that we apply the political broadcasting requirements of Sections 312(a)(7) and 315 to DBS providers, however, neither Section 25(a) nor its legislative history suggests any other specific requirements. Our tentative view is that, given the flexible regulatory approach taken for DBS and its early stage of development, no other regulations should be considered at this time. In particular, we believe that the reservation requirements for noncommercial, educational and informational programming set out in subsection (b) (described at paras. 18 and 37-40) are intended by Congress to satisfy the public interest obligations of DBS licensees and service providers. We note that the Cable Act provides the basis to impose additional obligations in the future should they be warranted. Nonetheless, commenters may address whether and what other types of regulations should be considered for DBS providers at this time.

30. As a related matter, we note that DBS service providers operating in whole or in part as broadcasters are already subject to the broadcasting provisions of Title III of the Communications Act.[31] Any rules we adopt pursuant to Section 25 of the 1992 Cable Act will not diminish such pre-existing statutory obligations.

C. Opportunities for Localism on DBS

31. Section 25(a) of the 1992 Cable Act also requires that we consider in this proceeding ". . . the opportunities that the establishment of DBS service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service." The legislative history of Section 25 provides little guidance as to the intent of Congress, other than to indicate that we should consider "the implications of the establishment of DBS systems for the principle of localism under the 1934 Act" and how that principle may be served by technological developments or regulation.[32] Since DBS systems are essentially designed to serve the entire continental United States, we interpret Congress' directive to be that we consider whether a national mode of programming service such as DBS can accomplish the long standing goal of service to individual communities.

32. Traditionally, the Commission has licensed radio or television stations to serve local communities. This local-based system of licensing emanates from various sections of the Communications Act of 1934, as amended, such as Section 307(b) which provides that "the Commission shall make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[33]

33. By way of contrast, when the Commission first began to consider adopting policies and rules governing DBS, it recognized that "this satellite technology holds a unique potential to serve large land areas"[34] and that this technology does not fit the traditional model of local broadcast stations. At that time, it was observed by the court that:

> DBS technology is inherently unsuitable for the provision of traditional local broadcast service. The satellites involved cannot presently be located with the requisite precision nor economically equipped with a sufficiently large antenna to provide a spot beam capable of covering only a traditional size local community. Moreover, many of the benefits of DBS -- including narrowcasting and provision of service to less densely populated areas -- could not practically be realized by a local DBS system.[35]

As a result, DBS was authorized as a nonlocal service that would provide service on a national or regional basis. Furthermore, the Commission determined, and the court agreed, that Section 307(b) of the Communications Act does not preclude authorizing a nonlocal service such as DBS.[36]

34. We note that approximately ten years have passed since we adopted our interim rules governing DBS, and that technological changes may have occurred that would change our original conclusions about the necessary configuration of DBS signals. Therefore, in compliance with Congress' directive in Section 25(a) of the 1992 Cable Act, we solicit comment on whether current technology would be capable of adding or deleting satellite delivered programming to accommodate local concerns. In this regard, we note that the feasibility of spot beams with small satellite footprints that would reach a coverage area of 100 to 200 square miles may be in the experimental stage for satellites proposed to operate at 18-30 GHz in the Ka-band, but we know of no similar proposals for Ku-band facilities. In addition, even if technically feasible, such a system may be prohibitively expensive as it would add greatly to the complexity of the spacecraft.

35. We further note that, in a previous order, the Commission examined the possibility of requiring receivers to have the capability to delete certain programming according to zip codes that might be subject to syndicated exclu-

[31] *See DBS Report and Order*, 90 FCC 2d at 709.
[32] *See* Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991) at 92.
[33] 47 U.S.C. § 307(b).
[34] *See Notice of Proposed Policy Statement and Rulemaking* in Gen. Docket No. 80-603, 86 FCC 2d 719, 737 (1981).
[35] *NAB v. FCC*, 740 F.2d 1190, 1197 (D.C. Cir. 1984).
[36] *DBS Report and Order*, 90 FCC 2d at 685-86; and *NAB v. FCC*, 740 F.2d at 1197-99.

sivity rules.[37] That study acknowledged that such technology exists but also pointed out that full implementation would be expensive and burdensome. In addition, it appears that the only feasible way to add substituted programming would be with the use of an additional transmission, either by an additional transponder or compressed channel. Such a method might not be workable if localism were defined as individual communities but might be compatible with a regional definition. However, we again question the amount of economic burden such requirements would place on DBS providers. We seek comments on the technical as well as economic issues raised here.

36. We also believe that any regulations regarding DBS and localism would necessarily depend upon whether it is technically possible and economically feasible to provide local DBS service. Accordingly, we will compile a record on this issue before considering whether any regulations would be appropriate. Our tentative view, however, is that if a local DBS service is not technically and economically feasible, other regulations should not be considered in this area given that DBS is a fledgling industry and that there is an abundance of local broadcast stations and cable television systems that are already serving local needs. However, the 1992 Cable Act permits us to modify this view if circumstances warrant in the future.

IV. CARRIAGE OBLIGATIONS FOR NONCOMMERCIAL, EDUCATIONAL AND INFORMATIONAL PROGRAMMING

37. We will next discuss implementation of the provisions of Section 25(b) of the 1992 Cable Act. Subsections (1) through (3) mandate that:

> (1) [t]he Commission shall require, as a condition of any provision, initial authorization or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.
>
> (2) A provider of such service may utilize for any purpose any unused channel capacity required to be reserved under this subsection pending the actual use of such channel capacity for noncommercial programming of an educational or informational nature.
>
> (3) A provider of direct broadcast satellite service shall meet the requirements of this subsection by making channel capacity available to national educational programming suppliers, upon reasonable prices, terms, and conditions as determined by the Commission under paragraph (4). The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection.

We will address these issues below.

38. The *Conference Report* indicates that the purpose of Section 25(b) of the Cable Act "is to define the obligation of direct broadcast satellite service providers to provide a minimum level of educational programming."[38] The *Conference Report* states that the reservation requirement was cast in terms of a four to seven percent range to give "the Commission the flexibility to determine the amount of capacity to be allotted."[39] Further, the conferees intended that "the Commission consider the total channel capacity of a DBS system in establishing reservation requirements."[40] In considering this total channel capacity, the *House Report* on H.R. 4850 stated that "the Commission may consider the availability of or the use by a DBS operator of compression technologies."[41]

39. While this legislative history provides some guidance as to Congress' intent with regard to subsection 25(b), there are several important issues that are not discussed but need to be considered. For example, does this section require that discrete channels be reserved for noncommercial use or that a percentage of cumulative time be reserved for noncommercial use? If it is the former, how do we calculate the total channel capacity for a DBS system? Should we count the number of channels licensed or allotted to a DBS distributor? Or, should we count the number of channels supplied to customers? This latter approach would take into account the potential for expanding the number of channels by compression techniques as suggested by the *House Report*. We seek comment on these issues.

40. Next, how should we determine the percentage or number of channels that should be reserved for noncommercial use? Should DBS systems with relatively large total channel capacity be subjected to a greater reservation requirement than systems with relatively less total capacity, as suggested in the *Conference Report*?[42] If so, how do we define a DBS system with a large channel capacity? Also, should the reservation requirement be cast in terms of a percentage or a discrete whole number of channels that must be reserved? Since the number of channels in DBS systems will likely vary, using a percentage could result in requirements such as 3.5 channels being reserved. To avoid having to reserve parts of channels, we propose that a sliding scale be used so that systems falling into various categories (such as having 20 to 30 channels) would be required to reserve a specific number of channels. These numbers would accommodate the Congressional intent that between four and seven percent of channel capacity be reserved. We seek comment on this proposal. In addition, in order to account for the nascent stage of DBS develop-

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[37] *Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Station Receivers*, 6 FCCRcd 725 (1991).

[38] House Committee on Energy and Commerce, H.R. Conf. Rep. No. 102-862, 102d Cong. 2d Sess. 99 (1992).

[39] *Id.*

[40] *Id.*

[41] House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong. 2d Sess 124 (1992). Compression technologies refers to the ability to compress sufficient information to display multiple video programs into the spectrum currently allotted for one channel. As a result, a Part 100 DBS system with 10 allotted channels of specified spectrum width (6 MHz for each channel) could conceivably deliver up to 40 channels of video service. These numbers are expected to increase over time.

[42] *See Conference Report* at 99.

ment, should the reservation requirement increase over time, for individual DBS operators or for the industry as a whole, within the 4% - 7% range specified? We also seek comment on whether DBS providers who are offering service pursuant to executed contracts with programming suppliers should have all existing services grandfathered, and be subject to these reservation requirements only upon the expansion of their service to include additional channels. In this regard, commenters should address the effect on DBS service providers and on the overall availability of reserved channels that would result, and the impact of these results on the achievement of the underlying goals of Congress in enacting this provision.

41. *Responsibility for Programming.* Since Section 25(b) mandates that no editorial control should be exercised by the DBS provider over the noncommercial programming aired, we solicit comment on who should be responsible for the programming in the event Commission Rules or federal statutes are violated. In this regard, we note that under Section 315(a) of the Communications Act, a licensee may not censor material broadcast by or on behalf of a candidate, and, as recognized by the Commission and the U.S. Supreme Court, the responsibility for the programming and any harm it may cause, such as defamation, remains with the candidate.[43] We tentatively believe that a similar approach should be followed here, and that a DBS provider should not be liable for harm or violations caused by programming over which it has no control. We solicit comment on this view. We also request comment on whether the noncommercial program provider using reserved channel capacity must comply with the political broadcasting requirements imposed by Section 25, and if so, how those obligations should be enforced.

42. We also question whether there may be limited circumstances in which a DBS provider can refuse carriage of programming or can restrict its dissemination. In this regard, we note that the Cable Act provides such a mechanism for cable operators that is the subject of a separate rulemaking proceeding.[44] Specifically, Section 12 of the Cable Act permits cable operators to channel indecent programing to a single leased access channel that can only be accessible to subscribers upon request and to prohibit the use of public, educational and governmental access channels for programming that contains obscene material, sexually explicit conduct or material soliciting or promoting unlawful conduct. However, no such mechanism was provided for DBS systems.[45] We solicit comment on the impact of this omission.

43. *Definition of National Educational Programming Supplier.* Section 25(b)(3) requires that a DBS provider shall make its reserved channel capacity available to national educational programming suppliers, and Section 25(b)(5)(B) states that "[t]he term national educational programming supplier' includes any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions." We solicit comment as to the scope of the term national educational programming supplier. We are of the view that this term would encompass not only public television licensees but also entities such as the Public Broadcasting Service which disseminate programming on a national basis to public television stations. To what extent should we incorporate the definitions of Section 397 of the Communications Act of 1934, as amended, which delineate "noncommercial educational broadcast station," "public broadcasting entity," and "public telecommunications entity" for purposes of receiving governmental funding?[46] What other entities should be included? Also, what is the significance of the term "national" in "national educational programming supplier"? We note that Congress explicitly included noncommercial educational television stations, as well as public or private educational institutions, which are all generally perceived to be local entities.[47] Furthermore, to qualify for capacity under the reservation provision, or to satisfy a DBS service provider's obligations under this provision, should we take into consideration any corporate relationship between the DBS provider and the program supplier? If so, should some specific portion of the reserved capacity be allowed for program suppliers with a designated relationship with the DBS service provider? In this regard, commenters may address the specific provision prohibiting the DBS service provider from exercising edi-

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[43] *See Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) (broadcaster not responsible for defamation caused by political candidates advertisement).

[44] *See Notice of Proposed Rule Making* in MM Docket No. 92-258, 7 FCC Rcd 7709 (1992).

[45] The Commission has recognized an exception that gives common carriers, for instance, the right to prohibit the use of their facilities for an illegal purpose. *See Memorandum Opinion, Declaratory Ruling, and Order* in Gen. Docket No. 83-989, 2 FCC Rcd 2819 (1987); and *Humane Society v. Western Union International, Inc.*, 30 FCC 2d 711, 713 (1971). We also note that the Commission has solicited public comment on whether a broadcaster may, consistent with the "reasonable access" provisions of Section 312(a)(7) and the "no censorship" provisions of Section 315(a) of the Communications Act, channel indecent or other programming that may be harmful to children into those hours when there is no reasonable risk of children being in the audience. *See Public Notice*, MM Docket No. 92-254,h),FCC 92-486, released October 30, 1992. We seek comment on the extent to which similar policies could and should be applied to DBS providers consistent with Section 25's "no censorship" provision.

[46] Subsection (b)(6) defines a noncommercial educational broadcast station or a public broadcast station as one which "(A) ... is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes." Subsection (11) defines a public broadcasting entity as the Corporation for Public Broadcasting or any public broadcasting station licensee or permittee, or "any nonprofit institution engaged primarily in the production, acquisition, distribution, or dissemination of educational and cultural television or radio programs." Subsection (12) defines a public telecommunications entity as "any enterprise which - (A) is a public broadcast station or a noncommercial telecommunications entity; and (B) disseminates public telecommunications services to the public. 47 U.S.C. Section 397.

[47] Commenters may desire to examine the eligibility criteria for the Instructional Television Fixed Service (ITFS) and consider whether these criteria have any relevance here. *See* 47 C.F.R. § 74.932(a) (ITFS licensees may be accredited educational institutions, governmental organizations engaged in the formal education of enrolled students, or nonprofit organizations whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations). *See also Second Report and Order* in MM Docket No. 83-523, 101 FCC 2d 49, 60 (1985).

torial discretion over the material on these channels, as well as Congress' overall intentions for the uses of these reserved channels.

44. *Definition of Noncommercial Educational and Informational Programming.* As previously mentioned, Section 25(b)(1) requires that a portion of a DBS provider's total channel capacity be reserved exclusively for noncommercial educational and informational programming; however, that term is not defined elsewhere in the section. Rather, it appears that the House version of the Cable Act, which was the basis for this section, was cast in terms of various types of enumerated public service uses. As the *House Report* states, these public service uses include programming produced by:

> (1) telecommunications entities, including programming furnished to such entities by independent production services; (2) public or private educational institutions, or entities for educational, instructional, or cultural purposes; and (3) any entity to serve the disparate needs of specific communities of interest, including linguistically distinct' groups, minority and ethnic groups, and other groups.[48]

However, these public service uses were not retained in Section 25(b), and, instead, the Conferees inserted a definition, as described above, of the types of educational programming suppliers that may obtain access to the reserved channels. In view of this brief legislative history, we solicit comment as to whether it is necessary for the Commission to define the term "noncommercial educational and informational programming." If so, what should that term include? Should the Commission decide the types of entities that may seek access to the reserved channel capacity and not enumerate the specific types of programming that may be aired?

45. *Use of Unused Channel Capacity.* Section 25(b)(2) of the 1992 Cable Act permits a DBS service provider to ". . . utilize for any purpose any unused channel capacity required to be reserved under this subsection pending the actual use of such channel capacity for noncommercial programming of an educational or informational nature." According to the *Conference Report*, this language permits a DBS service provider to utilize this reserved channel capacity "until the use of such channel capacity is obtained for public service use."[49] However, neither Section 25(b)(2) nor the *Conference Report* defines what constitutes the "use" of a channel. We note, however, that both the *House Report* and the *Senate Report* contain similar language indicating that the DBS service provider may use these reserved channels until the use of such channel is obtained pursuant to a written agreement for public service use.[50] Accordingly, we solicit comment on what constitutes a "use" of a reserved channel by a noncommercial program provider that would trigger an end to the DBS service provider's ability to utilize such reserved channels. Does the "use" commence with the signing of a written agreement? Or, should a DBS service provider be able to use the reserved channel capacity until the noncommercial program provider is ready to commence broadcasting its programming?

46. *Rates.* Section 25 of the 1992 Cable Act gives the Commission several guidelines in determining what rates are appropriate for the channels required to be set aside under subsection (b)(3). The provision of these guidelines seems to suggest that the Commission assume a role in assuring that rates for non-commercial channels meet the criteria of Section 25. We therefore propose to elaborate on the general statutory guidelines as discussed below and seek comment on our interpretation. Further, we propose to address any disputes with respect to rates in the context of a complaint proceeding and not with rate making procedures.

47. Section 25(b)(4) states that the Commission, in determining whether a rate is appropriate, shall take into account the nonprofit character of the programmer to whom the capacity is provided and any federal funds used to support the programming. Second, the statute provides that the Commission shall not allow prices to exceed 50% of the direct costs of making the channel available. Third, in calculating direct costs, the Commission is required by statute to make certain exclusions.

48. With respect to the issue of nonprofit character and receipt of federal funding, the statute only states that this should be taken into account in any rate determination. Does this language mean that such characteristics should entitle some individual programmers to an even lower rate than 50% of the direct costs of the provider or do they affect in some other manner a final determination of the general rate that should be charged? We solicit comment on this issue.

49. The second statutory guideline provides that the Commission shall not allow prices greater than 50% of the direct costs of making the channel available. We seek comment on the appropriate percentage to use and the financial impact that this provision will have on DBS providers. Because DBS service under both Part 100 and Part 25 regulation is a fledgling industry, would charging noncommercial entities a rate comparable to half of their costs, or less, restrict the further development of the service? If so, does the Commission have any alternative approaches at its disposal given the direct language of the statute? Commenters may particularly address whether or when a rate less than 50% of costs can be reasonably justified. If no alternative approaches are available, should the Commission presume that charging noncommercial entities 50% of direct costs is reasonable?

50. Third, Section 25(b)(4) directs that the Commission exclude certain costs in its rate determination. Such costs to be excluded are "marketing costs, general administrative costs, and similar overhead costs" as well as "the revenue that such provider might have obtained by making such channel available to a commercial provider of video programming".[51] Under such a guideline, what costs should be included in determination of appropriate rates? The legislative history of the Cable Act[52] states that direct costs should include only the costs of transmitting the signal to the

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[48] *See House Report* at 124.
[49] *Conference Report* at 99.
[50] *See House Report* at 91; *Senate Report* at 124.
[51] 1992 Cable Act, Section 25(4)(C).
[52] *House Report* at 125.

uplink facility and the direct costs of uplinking the signal to the satellite and not any indirect costs such as marketing, general administrative or overhead. Costs such as a proportional share of construction, launch, and insurance of the space station used are not specifically excluded in the legislative history, nor are the continuing costs (on a proportionate basis) of the uplink facility used to provide the channel and a proportional share of the telemetry, tracking and control costs for the space station. In addition, certain overhead or personnel costs that are directly related to making the channel available to nonprofit groups could be considered "direct costs." For example, if a DBS provider has an authorization center or procedure used solely for the provision of noncommercial channels, such costs may be contemplated as allocable to noncommercial programmers. We request comment on how the rules should define "direct costs" for purposes of determining expenses chargeable to noncommercial programmers encompassed by this provision.

51. We note that subsection (b) of Section 25 assumes that noncommercial program suppliers will lease reserved channels from DBS providers. This type of arrangement, however, may not be the only way in which such channels are provided. For example, DBS providers may pay a program supplier for the use of its programming or may undertake various promotional activities in exchange for other consideration. We seek comment on the extent to which contractual arrangements, including rate agreements, under which programming comporting with the definitions of this provision is delivered, should be acceptable if mutually agreed to and whether programming so delivered can be counted toward fulfilling the DBS service provider's obligations under this section.

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

52. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same deadlines as comments on the other sections of this *Notice of Proposed Rule Making*. However, such comments must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice of Proposed Rule Making* and regulatory flexibility analysis to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

B. Ex Parte

53. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.203, and 1.206(a).

C. Comments

54. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **May 24, 1993,** and reply comments on or before **June 30, 1993.** To file formally in this proceeding, you must fileh)4an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

D. Additional Information

55. For additional information on this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 632-5414, or Rosalee Chiara, Common Carrier Bureau, (202) 634-1781.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for action:* This action is taken to implement Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 which requires the Commission to adopt public service obligations for providers of direct broadcast satellite ("DBS") service providing video programming.

II. *Objective of this Action:* This action has three objectives. First, the *Notice* proposes to apply the political broadcasting requirements of Sections 312(a)(7) and 315 of the Communications Act to DBS service providers and to consider whether any other public interest requirements should also be imposed. Second, the *Notice* seeks to compile a record on whether a national mode of broadcasting such as DBS can accomplish the Commission's long standing goal of service to individual communities by beaming programming to local or regional areas. Third, the *Notice* solicits comments on requiring DBS service providers to reserve between 4% and 7% of their total channel capacity for noncommercial, educational and informational programming and to make this channel capacity available to national educational programming suppliers upon reasonable prices, terms, and conditions as determined by the Commission.

III. *Legal Basis:* Authority for the actions proposed in this *Notice* may be found in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992.

IV. *Reporting, Recordkeeping, and Other Compliance Requirements:* Application of the political broadcasting requirements of Sections 312(a)(7) and 315 of the Communications Act would necessitate that DBS service providers maintain and permit public inspection of a complete record of all requests for broadcast time, the dispositions made of such requests, and the charges, if any, made for the time. With request to the carriage obligations for noncommercial, educational and informational programming, DBS service providers would have to process and authorize requests for use of the reserved channel capacity at reasonable rates as determined in this rulemaking proceeding.

V. *Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:* None.

VI. *Description, Potential Impact and Number of Small Entities Involved:* There are 9 entities that have construction permits for high-powered DBS satellite systems under Part 100 of the Commission's Rules that would become subject to these public interest obligations when they commence broadcasting. Other DBS systems under Part 25 of the Commission's Rules may also be subject to these public interest requirements, but at the present time we are aware of only one company -- which is a joint venture of various owners of multiple cable systems -- that is providing direct-to-home programming by satellite. The potential impact of applying the political broadcasting requirements to these entities is that they would have to sell air time at their lowest unit charge to federal candidates and to other types of candidates that they permit on the air. The potential impact of the carriage obligations for noncommercial programming is that, under Section 25(b) of the 1992 Cable Act, DBS service providers may not charge more than 50% of the "direct" costs of making a reserved channel available. This would presumably result in a loss on the use of these reserved channels. In addition, an unknown number of small entities such as public television stations and public or private educational institutions would have the opportunity to purchase time at a reasonable rates for the broadcasting of noncommercial educational and informational programming.

VII. *Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:* There are no alternatives with respect to the proposals to apply the political broadcasting rules or to establish carriage obligations for noncommercial educational and informational programming that would minimize the impact on small entities. However, with respect to the possibility of adopting other public interest requirements or considering how DBS systems could promote localism, there is an additional option -- that is, not to adopt regulations at this time but reserve the right to do so in the future if circumstances so warrant.